

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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LIBERTY MUTUAL INSURANCE GROUP,

Plaintiff,

v.

PANELIZED STRUCTURES, INC., et al.,

Defendants.

Case No. 2:10-cv-01951-MMD-PAL

ORDER

(Plf.'s Motion to Substitute LM Insurance Corporation as Plaintiff Real Party in Interest Pursuant to Rule 17(A) – dkt. no. 119; Def.'s Motion to Dismiss – dkt. no. 132; Def.'s Motion for Judicial Estoppel – dkt. no. 165)

PANELIZED STRUCTURES, INC.,

Counterclaimant,

v.

LIBERTY MUTUAL INSURANCE GROUP,  
LM INSURANCE CORPORATION, and  
LIBERTY MUTUAL INSURANCE  
GROUP/BOSTON,

Counterdefendants.

PANELIZED STRUCTURES, INC.,

Third-Party Plaintiff,

v.

ARIZONA LABOR FORCE, INC., an  
Arizona corporation, dba ALLIED FORCES  
TEMPORARY SERVICES,

Third-Party Defendant.

1     **I.     SUMMARY**

2           Before the Court are Plaintiff Liberty Mutual Insurance Group's Motion to  
3     Substitute LM Insurance Corporation as Plaintiff Real Party in Interest Pursuant to Rule  
4     17(a) (dkt. no. 119), Defendant Panelized Structure's Motion to Dismiss (dkt. no. 132),  
5     and Defendant Panelized Structure's Motion for Judicial Estoppel (dkt. no. 165). Liberty  
6     Mutual Insurance Group alleges that this action was inadvertently brought in its name,  
7     rather than the name of its subsidiary, LM Insurance Corporation, who was the actual  
8     party to the disputed contract. However, Liberty Mutual Insurance Group brought this  
9     motion after two years of litigation, including litigation on the very subject of the real party  
10    in interest. For this reason, Panelized Structures opposes the motion, and has brought  
11    separate motions arguing that Liberty Mutual is estopped from making the argument that  
12    it is not the real party in interest, and that the Court lacks subject matter jurisdiction as  
13    the suit is not prosecuted by the real party in interest. For the reasons discussed below,  
14    Plaintiff's Motion to Substitute is granted, and Defendant's Motions to Dismiss and for  
15    Judicial Estoppel are denied. Liberty Mutual is also ordered to show cause why the  
16    Court should not impose sanctions for its negligent misrepresentations to the Court.

17    **II.    BACKGROUND**

18           The facts of this case are more particularly set out in this Court's prior Orders.  
19    Pertinent to these motions is that Plaintiff Liberty Mutual Insurance Group ("Liberty  
20    Mutual") brought a subrogation action against Defendant Panelized Structures, Inc.  
21    ("Defendant") seeking to recover the amount of workman compensation benefits Liberty  
22    Mutual paid to its insured, whom Defendant had allegedly injured. On November 5,  
23    2010, Defendant moved to dismiss the action, (dkt. no. 5) arguing, *inter alia*, that LM  
24    Insurance Corporation ("LMIC") — a wholly owned subsidiary of Liberty Mutual — was its  
25    contractual insurer and the real party in interest. The Court's Order dated January 31,  
26    2011, (dkt. no. 18) rejected Defendant's argument based upon inspection of a copy of  
27    the insurance policy provided by Liberty Mutual, and Liberty Mutual's insistence that it  
28    was, in fact, the insurer. Defendant's Answer (dkt. no. 20) maintained as an affirmative

1 defense that Liberty Mutual was not the real party in interest and had no standing to  
2 bring suit.

3 After more than a year of litigation, Liberty Mutual brought this Motion to  
4 Substitute ("Substitution Motion"), seeking to substitute LMIC as the real party in interest.  
5 In the Substitution Motion, Liberty Mutual admits that it was not a party to the contract,  
6 but rather its subsidiary. LMIC was actually the insurer of the policy. Liberty Mutual  
7 alleges that it inadvertently brought the action in its own name, rather than the name of  
8 its subsidiary due to the fact that the insurance policy's declarations page lists both  
9 Liberty Mutual and LMIC. Inspection of Exhibit 1 attached to Liberty Mutual's Reply (dkt.  
10 no. 126-1) reveals that the policy includes the names of both "Liberty Mutual Insurance  
11 Group/Boston" and LMIC.<sup>1</sup> Liberty Mutual characterizes this as understandable  
12 oversight, and seeks now to replace itself with LMIC as the plaintiff to this action.

13 Defendant opposed the Substitution Motion, and brought a Motion for Judicial  
14 Estoppel ("Estoppel Motion") to prevent Liberty Mutual from arguing that it is not the real  
15 party in interest after it argued it was the real party in interest in its Response in  
16 Opposition to Defendant's Motion to Dismiss. Defendant has also brought a Motion to  
17 Dismiss ("Motion to Dismiss") arguing that because the case is not prosecuted by the  
18 real party in interest, no case or controversy exists, and the Court lacks jurisdiction to  
19 hear the matter.

### 20 **III. DISCUSSION**

#### 21 **A. Motion for Judicial Estoppel**

22 Preliminary to the question of whether substitution is proper at this point in the  
23 litigation is the question of whether Liberty Mutual is estopped from arguing it is not the  
24 real party in interest and is thus estopped from bringing the Substitution Motion. Thus,  
25 the Court first addresses Defendant's Estoppel Motion.

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27 <sup>1</sup>The Court notes that the copy of the policy originally submitted in opposition to  
28 Defendant's Motion to Dismiss was of poor quality, rendering LMIC's name at the top of  
the page illegible. (*Compare* dkt. no. 126-1 *with* dkt. no. 8-2.)

1           The equitable rule of judicial estoppel “generally prevents a party from prevailing  
2 in one phase of a case on an argument and then relying on a contradictory argument to  
3 prevail in another phase.” *Pegram v. Herdrich*, 530 U.S. 211, 227, n. 8 (2000). The  
4 purpose of the rule is “to protect the integrity of the judicial process by prohibiting parties  
5 from deliberately changing positions according to the exigencies of the moment.” *New*  
6 *Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (internal quotations omitted). Judicial  
7 estoppel “is an equitable doctrine invoked by a court at its discretion,” and “most  
8 commonly applied to bar a party from making a factual assertion in a legal proceeding  
9 which directly contradicts an earlier assertion made in the same proceeding or a prior  
10 one.” *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990) (internal citations omitted).

11           “[T]he circumstances under which judicial estoppel may appropriately be invoked  
12 are probably not reducible to any general formulation of principle,” *New Hampshire*, 532  
13 U.S. at 750 (quoting *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982)).  
14 However, in deciding whether to apply the doctrine, courts examine three factors: (1)  
15 whether the party’s later position was clearly inconsistent with its earlier position, (2)  
16 whether the party was successful in persuading a court to accept its earlier position such  
17 that acceptance of the later position would create the perception that either the first or  
18 the second court was misled, and (3) whether the party would derive an unfair  
19 advantage if not estopped. *Id.* at 750-51. In addition, “judicial estoppel seeks to prevent  
20 the *deliberate* manipulation of the courts, and therefore should not apply when a party’s  
21 prior position was based on inadvertence or mistake.” *U.S. v. Ibrahim*, 522 F.3d 1003,  
22 1009 (9th Cir. 2008) (internal quotations omitted).

23           Although the factors technically weigh in favor of applying judicial estoppel,  
24 Liberty Mutual’s actions do not appear to present the deliberate manipulation of the  
25 courts that the rule seeks to prevent. Liberty Mutual’s positions in this litigation are  
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1 certainly inconsistent<sup>2</sup> and it was successful in persuading the Court to deny Defendant's  
2 Motion to Dismiss. As a result, Defendant has been forced to defend against an action,  
3 which, at least at this point, would be barred by the applicable statute of limitations.  
4 Thus, having prevailed on the Motion to Dismiss by arguing that it was the real party in  
5 interest, the factors weigh in favor of applying judicial estoppel to prevent Liberty Mutual  
6 from prevailing at this stage with a contradictory argument. However, Liberty Mutual's  
7 prosecution of the action appears to be attributable to negligence and a lack of due  
8 diligence in investigating the policy, rather than a knowing and deliberate tactic to  
9 manipulate the Court for advantage. Thus, Liberty Mutual's change in position is not a  
10 deliberate attempt to adapt to the exigencies of the moment, but simply sloppy  
11 lawyering. Consequently, any prejudice that Defendant has suffered is nominal—  
12 although the caption of the case is technically incorrect, Defendant has been apprised of  
13 the action against it and has been able to prepare its defense. For these reasons,  
14 Liberty Mutual is not judicially estopped from making the argument that LMIC is the real  
15 party in interest. Defendant's Estoppel Motion is denied.

16 **B. Motion for Substitution**

17 Having resolved that preliminary question, the Court now considers the  
18 Substitution Motion.

19 The Federal Rules of Civil Procedure require that "[a]n action must be prosecuted  
20 in the name of the real party in interest." Fed. R. Civ. P. 17(a)(1). Where the action is  
21 originally brought by a party other than the real party in interest, the rule provides for  
22 substitution by limiting a court's ability to "dismiss an action for failure to prosecute in the  
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24 <sup>2</sup>Liberty Mutual makes the spurious argument that its actions were not  
25 inconsistent. Indeed, Liberty Mutual seems so self-assured of the accuracy of its  
26 argument that it asserts any disagreement with its position makes the Court inherently  
27 incorrect. (Dkt. no. 171 at 6.) ("Even if this Court (incorrectly) determines Liberty Mutual's  
28 current position is incompatible with its earlier position, judicial estoppel would still not  
apply.") Liberty Mutual apparently does not understand the definition of inconsistent.  
Liberty Mutual's first argument was that it was the real party in interest. Liberty Mutual's  
second argument was that it was not. In the Court's opinion, flawed as Liberty Mutual  
may perceive it to be, this is clearly inconsistent.

1 name of the real party in interest until, after an objection, a reasonable time has been  
2 allowed for the real party in interest to ratify, join, or be substituted into the action.” Fed.  
3 R. Civ. P. 17(a)(3). If the real party in interest ratifies, joins, or is substituted, the “action  
4 proceeds as if it had been originally commenced by the real party in interest.” *Id.* Thus,  
5 the action may be maintained, “even though the original plaintiff presumably has no  
6 standing.” *G.K. Las Vegas Ltd. P’ship v. Simon Prop. Group, Inc.*, No. CV-S-04-1199-  
7 DAE-RJJ, 2007 WL 4380134 at \*3 (D. Nev. Dec. 11, 2007) (*quoting Covert v. Liggett*  
8 *Group, Inc.*, 750 F.Supp. 1303, 1310 (M.D. La. 1990)).

9 However, substitution under Rule 17(a) is only applicable when the wrong party  
10 initiated suit because “determination of the right party to sue [was] difficult” or because  
11 “an understandable mistake [was] made.” See *U.S. for Use and Benefit of Wulff v. CMA,*  
12 *Inc.*, 890 F.2d 1070, 1074-75 (9th Cir. 1989) (*citing* Fed. R. Civ. P. 17 advisory  
13 committee’s notes). Consequently, the proper application of Rule 17(a) is only to avoid  
14 injustice through error correction. See *Goodman v. U.S.*, 298 F.3d 1048, 1053 (9th Cir.  
15 2002). Purposeful implementation of Rule 17(a) as part of trial strategy is improper. See  
16 *Wulff*, 890 F.2d at 1075 (“Rule 17(a) does not apply to a situation where a party with no  
17 cause of action files a lawsuit to toll the statute of limitations and later obtains a cause of  
18 action through assignment”).

19 Additionally, because the rule’s main purpose is to avoid injustice, “equitable  
20 principles should apply” in assessing the applicability of Rule 17(a) and the court must  
21 consider the prejudice to both parties and the public policy interest in litigating suits on  
22 their merits. *Continental Ins. Co. v. N.A.D., Inc.*, 16 Fed. Appx. 659, 661 (9th Cir. 2001)  
23 (*citing* Fed. R. Civ. P. 17 advisory committee notes). When considering prejudice to a  
24 defendant, “[a]s long as defendant is fully appraised of a claim arising from specified  
25 conduct and has prepared to defend the action, defendant’s ability to protect itself will  
26 not be prejudicially affected if a new plaintiff is added, and defendant should not be  
27 permitted to invoke a limitations defense.” 6A Charles A. Wright, Arthur R. Miller, Mary  
28 Kay Kane, & Richard L. Marcus, *Federal Practice and Procedure* § 1501 (3d ed. 2012);

1 *Rousseau v. Diemer*, 24 F.Supp.2d 137,144 (D. Mass. 1998). When considering public  
2 policy, more time and expense spent in litigation increases the weight of the policy  
3 favoring decisions on the merits. See *Continental*, 16 Fed. Appx. at 662.

4 In its Response in Opposition, Defendant argues that Liberty Mutual should be  
5 denied substitution because Liberty Mutual, as a non-party to the contract, lacks  
6 standing to bring the motion. Such a construction of Rule 17(a) completely ignores the  
7 rule's substitution provisions, which specifically contemplate transfer from a non-party to  
8 the real party in interest without any interruption of the proceedings. Moreover, the  
9 cases that Defendant cites in support of its argument deal primarily with the proper  
10 application of Rule 17(a) rather than standing. Further, those cases deal with scenarios  
11 where the named plaintiff was an entity completely foreign to the real party in interest  
12 and brought suit with knowledge that it was not the real party in interest. The situation  
13 presented here of a parent corporation suing rather than the real-party-in-interest-  
14 subsidiary is not necessarily analogous to those cases. Thus, Liberty Mutual can  
15 properly bring the motion.

16 In assessing the merits of the Substitution Motion, Liberty Mutual's argument that  
17 its prosecution of this action resulted from an understandable mistake is somewhat  
18 questionable.<sup>3</sup> Liberty Mutual *should* have known LMIC was the actual party to the  
19 contract. The Court presumes that an insurance conglomerate should have the  
20 sophistication and organizational capacity to identify which of its legal entities is a party  
21 to a particular contract. Additionally, Liberty Mutual's motion cites no new facts or events  
22 that brought its error to light or cleared up the confusion under which Liberty Mutual was  
23 laboring. This suggests Liberty Mutual possessed all the information needed to  
24 determine the real party in interest at the outset of litigation. Thus, while Liberty Mutual's  
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26 <sup>3</sup>Liberty Mutual's Substitution Motion never actually avers its actions resulted from  
27 a mistake or difficulty in determining who actually was signatory to the policy. Only  
28 Liberty Mutual's Reply to the Substitution Motion characterizes Liberty Mutual's actions  
as understandable oversight due to the presence of both Liberty Mutual and LMIC listed  
on the policy form.



1 prosecution of this action may have resulted from “mistake,” the Court questions whether  
2 such a mistake was “understandable.”

3       Additionally, whether Liberty Mutual brought this Substitution Motion within a  
4 reasonable time after Defendant brought its objection in the form of its Motion to Dismiss  
5 is also questionable. An objection is raised by the filing of a motion. *See Continental Ins.*  
6 *Co. v. N.A.D., Inc.*, 16 Fed. Appx. 659 (citing *Weissman v. Weener*, 12 F.3d 84, 87 (7th  
7 Cir. 1993)). Thus, Liberty Mutual was on notice that it was not the real party in interest  
8 on November 5, 2010, when Plaintiff filed its Motion to Dismiss. Liberty Mutual did not  
9 bring this Substitution Motion until May 25, 2012, nearly two years later. The Court also  
10 questions whether a near twenty-month delay was a “reasonable time” under the  
11 circumstances.

12       However, Liberty Mutual’s actions do not appear to be a purposeful  
13 implementation of Rule 17(a) as part of trial strategy. Rather, Liberty Mutual’s  
14 prosecution of the action seems more a result of a negligent or lack of due diligence.  
15 Defendant’s argument that Liberty Mutual brought suit to toll the statute of limitations to  
16 preserve the action for its subsidiary seems unlikely and is unsupported by evidence.  
17 The Court finds that Liberty Mutual’s inadvertence, even if bordering on unreasonable, is  
18 not the type of action excepted from substitution under Rule 17(a).

19       Further, application of Rule 17(a) must be viewed in light of the potential  
20 prejudices to the parties and policies in favor of decisions on the merits, which, in this  
21 case, weigh in favor of substitution. Denial of the Substitution Motion would result in  
22 great prejudice to the LMIC, the actual real party in interest, but a grant of the  
23 Substitution Motion would not result in great prejudice to Defendant. Denial of the  
24 Substitution Motion would amount to a dismissal of the entire case since, at this point,  
25 the statute of limitations has run on the claim and any subsequent suit would be barred.  
26 Consequently, LMIC would be wholly deprived of any remedy to which it may have been  
27 entitled. Contrarily, although Defendant has suffered some inconvenience from denial of  
28 its Motion to Dismiss and the failure to have this issue resolved at the outset of litigation,



1 Defendant has been fully apprised of the claim, has prepared to defend, and has in fact  
2 defended itself against this action for some time. Moreover, had the Court granted  
3 Defendant's original motion to dismiss, the result likely would have been an amended  
4 complaint or substitution motion brought at that time rather than now; litigation would  
5 have nonetheless continued. Additionally, although discovery has closed, LMIC has  
6 ratified each answer provided by Liberty Mutual in response to Defendant's discovery  
7 requests. Defendant has not identified any additional discovery that would have to take  
8 place or inaccuracies resulting from Liberty Mutual rather than LMIC providing the  
9 information.

10 Furthermore, this litigation has been ongoing for more than two years and the  
11 parties have expended significant resources. The policy considerations favoring a  
12 decision on the merits weigh heavily in favor of substitution in this case. Although  
13 Liberty Mutual should have been able to determine which of the group of companies was  
14 actually a party to a contract or, alternatively, should have been able to correct this error  
15 sooner, the Court finds that the actions of Liberty Mutual do not make Rule 17(a)  
16 inapplicable and the resulting prejudices to the parties as well as the public policy in  
17 favor of decisions on the merits require that the Substitution Motion be granted.

### 18 **C. Motion to Dismiss**

19 In addition to opposing the Substitution Motion, Defendant also moves the Court  
20 to dismiss the case as it is not prosecuted by the real party in interest. However, having  
21 granted the Substitution Motion, this motion is moot. Rule 17(a) contemplates that a  
22 proper plaintiff may be substituted for an improper one and does not deprive a court of  
23 jurisdiction even though the original, improper plaintiff is shown to not have standing.  
24 Rule 17(a) also allows the case to proceed "as if it had been originally commenced by  
25 the real party in interest." Thus, the Court retains jurisdiction and the action may  
26 proceed; Defendant's Motion to Dismiss is denied as moot.

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1           **D.      Order to Show Cause**

2           Notwithstanding the Court's grant of Liberty Mutual's Substitution Motion, Liberty  
3           Mutual made misrepresentations to the Court. An attorney has a duty to conduct a  
4           reasonable inquiry as to the accuracy of statements made in any "pleading, written  
5           motion, or other paper" submitted to the Court. Fed. R. Civ. P. 11(b). Violation of this  
6           rule may, after opportunity to respond result in sanctions levied on the "attorney, law  
7           firm, or party that violated the rule or is responsible for the violation." Fed. R. Civ. P.  
8           11(c)(1).

9           While Liberty Mutual's misrepresentations may have resulted from inadvertence,  
10          its mistake could have been avoided by minimal investigation. Liberty Mutual's apparent  
11          negligence has required Defendant and the Court to expend significant resources to  
12          resolve an issue which Liberty Mutual should have resolved before the litigation and at  
13          minimal cost. Consequently, Liberty Mutual is ordered to show cause, within fourteen  
14          (14) days of this order, why it should not be sanctioned in the amount of any of  
15          Defendant's attorney fees shown to be significantly associated with Liberty Mutual's  
16          misrepresentation.

17          **IV.      CONCLUSION**

18          IT IS THEREFORE ORDERED that Defendant's Motion for Judicial Estoppel (dkt.  
19          no. 165) is DENIED.

20          IT IS FURTHER ORDERED that Plaintiff's Motion to Substitute LM Insurance  
21          Corporation as Plaintiff Real Party in Interest Pursuant to Rule 17(A) (dkt. No. 119) is  
22          GRANTED.

23          IT IS FURTHER ORDERED that Defendant's Motion to Dismiss (dkt. No. 132) is  
24          DENIED as moot.

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1 IT IS FURTHER ORDERED that Plaintiff Liberty Mutual is ordered to show cause  
2 within fourteen (14) days of this order why it should not be sanctioned in the amount of  
3 any of Defendant's attorney fees shown to be significantly associated with Liberty  
4 Mutual's misrepresentation.

5 DATED THIS 26<sup>th</sup> day of February 2013.

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9 MIRANDA M. DU  
10 UNITED STATES DISTRICT JUDGE  
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